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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 922

MRS. AMELIA MILLS BYRAM,
Petitioner,

versus

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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I.

REPORTS OF OPINIONS BELOW

1. Opinion of the United States District Court for the Western District of Louisiana, Alexandria Division (Honorable Edwin F. Hunter, Jr., District Judge) in Civil Action No. 6460, *Mrs. Amelia Mills Byram v. Equitable Life Assurance Society of the United States*, dated June 15, 1959, reported in:

180 Federal Supplement 620

2. Per Curiam opinion of the United States Court of Appeals for the Fifth Circuit (Honorable Richard T. Rives, Chief Judge, and the Honorable Joseph C. Hutcheson, Jr. and the Honorable Warren L. Jones, Circuit Judges) in No. 17985, *Mrs. Amelia Mills Byram, Appellant v. Equitable Life Assurance Society of the United States*, dated February 11, 1960, reported in:

274 Federal Reporter, 2d Series 822.

II.

LOUISIANA STATUTES INVOLVED

1. Louisiana Revised Statutes, Title 22, Section 170, Subsection B, (West's Louisiana Statutes Annotated, Vol. 15, pages 226-227) reads as follows:

"No policy of life insurance delivered or issued for delivery in this state shall contain any provision which excludes or restricts liability for death caused in a certain specified manner or occurring while the insured has a specified status, except the following provisions, or provisions which in the opinion of the Secretary of State are substantially the same or more favorable to policyholders:*

"Provisions excluding or restricting coverage in the event of death occurring:

"(1) As a result of war declared or undeclared under conditions specified in the policy.

"(2) While in (a) the military, naval or air forces of any country at war, declared or unde-

* By amendment adopted in 1958 the words *"Secretary of State"* were changed to read *"commissioner of insurance."*

clared, or (b) any ambulance, medical, hospital or civilian noncombatant unit serving with such forces, either while serving with or within six months after termination of service in such forces or units.

"(3) *As a result of self-destruction while sane or insane within two years from the* **date of issue** *of the policy.*

"(4) As a result of aviation under conditions specified in the policy.

"(5) Within two years from date of issue of the policy as a result of a specified hazardous occupation or occupations, or while the insured is residing in a specified foreign country or countries.

"In the event of death as to which there is an exclusion or restriction pursuant to paragraphs (1), (2), (3), (4), or (5) of this Sub-section, the insurer shall pay an amount not less than the reserve on the face amount of the policy, computed on the basis specified in the policy, together with the reserve for any paid-up additions thereto, and any dividends standing to the credit of the policy, less any indebtedness to the insurer on the policy, including interest due or accrued.

"In the event of death as to which there is an exclusion or restriction pursuant to paragraph (2) of this Sub-section, the insurer shall pay the greater of (a) the amount specified in the preceding paragraph or (b) the amount of the gross premiums charged on the policy less dividends paid in cash or used in the payment of premiums thereon and less any indebtedness to the insurer on the policy, including interest due or accrued.

"A clause in any policy of life insurance, issued under this Code, providing that such policy shall be incontestable after a specified period shall preclude only a contest of the validity of the policy, and shall not preclude the assertion at any time of defenses based upon provisions which exclude or restrict coverage as provided in this Sub-section, whether or not such restrictions or exclusions are excepted in such clause; nor upon a provision regarding misstatement of age as provided in paragraph (4) of Sub-section A of this Section, whether or not such provision is excepted in such clause.

"Nothing contained herein shall apply to any provision in a life insurance policy for additional benefits in the event of death by accident or accidental means." (Emphasis supplied.)

2. Louisiana Revised Statutes, Title 22, Section 171 (West's Louisiana Statutes Annotated, Vol. 15, pages 271-272) reads as follows:

"No insurer shall knowingly deliver or issue for delivery in this state any policy or contract of life insurance which purports to be issued or to take effect as of a date **more** *than six months before the application therefor was made,* if thereby the premium on such policy or contract is reduced below the premium which would be payable thereon as determined by the nearest birthday of the insured at the time when such application was made. No agent or other representative of an insurer shall in this state prepare, submit or accept any application for life insurance which bears a date earlier than the date when such application was made by the insured or applicant, if thereby the premium

on such policy is reduced as above stated. Nothing contained in this Section shall invalidate any contract made in violation of this Section. This Section shall not be construed to prohibit the exchange, alteration or conversion of policies of life insurance as of the original date of such policies if the amount of insurance provided under the new policy does not exceed the amount of insurance under the original policy or the amount of insurance which the premium paid for the original policy would have purchased if the new policy had been originally applied for, whichever is greater; nor to prohibit the exercise of any conversion privilege contained in any policy or contract." (Emphasis supplied.)

III.

QUESTIONS PRESENTED FOR REVIEW

Respondent submits that the questions presented by petitioner's petition for writ would be more accurately stated as follows:

1. Is it legal for parties to a contract of life insurance to stipulate that premiums shall run from the register date of the policy but that the two-year exclusion of suicide shall run from the subsequent "*date of issue*" of the policy?

2. Is the answer to the above question altered by the fact that under Louisiana jurisprudence insurance contracts have been held in certain respects to be "indivisible"?

3. Are there any conflicts between the provisions of the policies at issue on the one hand, and the provisions of the applications for those poli-

cies and of the premium receipts issued in connection with those policies on the other hand, which justify the Court in holding that the two-year suicide exclusion should run from the date from which premiums on the policies were paid rather than from the respective *dates of issue* of the policies?

IV.

STATEMENT OF THE CASE

On April 14, 1955 James E. Byram, Jr. executed Part I of an application to The Equitable Life Assurance Society of the United States for a life insurance policy on his life in the face amount of $10,000.00. On April 16, 1955 Part II of said application (being the statements made by the said James E. Byram, Jr. to the medical examiner) was signed by the said James E. Byram, Jr. on being examined by the medical examiner of The Equitable Life Assurance Society of the United States. Pursuant to said application there was issued on May 9, 1955 by The Equitable Life Assurance Society of the United States to James E. Byram, Jr. as the insured, life insurance policy No. MP 14,742,108 in the face amount of $10,000.00.

Part I of the application for said policy No. MP 14,742,108, contains the following language:

> "The first monthly premium of $28.70 has been paid to J. M. McClure on the policy applied for above in accordance with the provisions of the receipt of date and number corresponding to this application

which is hereby accepted subject to the conditions thereof."

The receipt referred to reads as follows:.

> "RECEIVED of J. E. Byram, Jr., No. J563581 Twenty-eight & 70/100 . . . . . Dollars the first monthly premium on proposed insurance for $10,000.00 on the life of J. E. Byram, Jr. for which Part I of an application bearing a corresponding number as above is this day made to The Equitable Life Assurance Society of the United States. Insurance, *subject to the terms and conditions of the policy contract,* shall take effect as of the date of this receipt, provided satisfactory Part II of the application is furnished to the Society and *provided the person whose life is proposed for insurance is on this date, in the opinion of the Society's authorized Officers in New York, an insurable risk under its rules and the application is otherwise acceptable on the plan and for the amount and at the rate of premium applied for;* otherwise the payment evidenced by this receipt shall be returned on demand and upon the surrender of this receipt." (Emphasis supplied.)

On June 9, 1955, James E. Byram, Jr. executed Part I of an application to The Equitable Life Insurance Society of the United States for a life insurance policy on his life in the face amount of $20,000.00 which part of said application contains the following handwritten notation:

> "Please date contract 16 April 1955, conserving age 42. Issue on medical dated 16 April 1955 in issuing contract #14,742,108."

and pursuant to said application, there was issued on July 6, 1955 by The Equitable Life Assurance Society of the United States to James E. Byram, Jr. as the insured, life insurance policy No. MP 14,785,307 in the face amount of $20,000.00.

On executing the application James E. Byram, Jr. paid the first three monthly premiums, aggregating $172.20, on said policy, and the application made reference thereto in the same manner as the previous application had made reference to the first monthly premium. Too, there was issued to him a receipt in the same form as that issued in connection with the previous policy.

The concluding or testimonium clause in each of policies Nos. MP 14,742,108 and MP 14,785,307 reads as follows:

> "This policy is executed at the Home Office of the Society in New York on the Date of Issue stated above."

In policy No. MP 14,742,108 the following words appear on the first page of said policy immediately above the insuring clause:

"DATE OF ISSUE May 9, 1955"

In policy No. MP 14,785,307 the following words appear on the first page of said policy immediately above the insuring clause:

"DATE OF ISSUE July 6, 1955"

On each of said policies on the reverse or jacket thereof, there appear the following words:

"REGISTER DATE April 16, 1955"

In both of said policies, premiums are stated to run from April 16, 1955, the Register Date of both policies.

Each of said policies contains the following clauses on page 4 under the heading "Definitions and General Provisions":

"THE CONTRACT. This insurance is granted in consideration of the payment to the Society of the first and subsequent premiums as required by the terms of this policy.

"This policy, and the application therefor, a copy of which is attached hereto and made a part hereof at the *Date of Issue*, constitute the entire contract between the parties. All statements made by the Insured or in his behalf in the application for this policy shall be deemed representations and not warranties, and no such statement shall avoid this policy or be used in defense of a claim hereunder unless contained in the written application therefor and a copy of such application is attached hereto when issued.

"POLICY YEARS AND ANNIVERSARIES. The first policy year will begin on the *Register date* stated on the back of this policy and the second and subsequent policy years will begin on the anniversaries of the *Register date*, which are referred to herein as policy anniversaries.

"SUICIDE. In the event of the suicide of the Insured, sane or insane, within two years from the *Date of Issue*, the Society's liability will be limited to the payment to the person entitled to receive the first payment on account of the proceeds of this policy, of a single sum equal to the premiums actually paid under this policy less any indebtedness to the Society against this policy."

"INCONTESTABILITY. Except as to any provision attached to and made part of this policy relating to total and permanent disability or to additional indemnity in event of death by accidental means, this policy, provided premiums have been duly paid, shall be incontestable after it has been in force during the lifetime of the Insured for a period of two years from its *Date of Issue*." (Emphasis supplied.)

James E. Byram, Jr., the insured under each of said policies, took his own life on May 6, 1957 by committing suicide.

Prior to his death James E. Byram, Jr. had paid premiums aggregating $731.60 on policy No. MP 14,742,108 and $1,435.00 on policy No. MP 14,785,307. Premiums were paid on both policies for periods extending beyond May 6, 1957, the date of the suicide of the insured.

Following the death of the insured, The Equitable Life Assurance Society of the United States tendered to Mrs. Amelia Mills Byram, the beneficiary named in said policies and the plaintiff in this suit, the sum of

$2,166.60, representing the amount of premiums actually paid to said Company under said policies. Said tender was refused by Mrs. Amelia Mills Byram, and The Equitable Life Assurance Society of the United States deposited the said sum of $2,166.60 in the registry of the trial court for payment to Mrs. Amelia Mills Byram.

The case, originally filed in the Ninth Judicial District Court for the Parish of Rapides, Louisiana, to recover the face amounts of the two policies, was removed by respondent on ground of diversity of citizenship to the United States District Court for the Western District of Louisiana, Alexandria Division, and it was in the latter court that the above deposit was made.

Respondent defended on the ground that James E. Byram, Jr. had committed suicide within two years of the respective *Dates of Issue* of the policies, so that liability was restricted to the aggregate of premiums which had been deposited in registry of court.

The district judge sustained the defense of suicide and referred petitioner to the premiums placed in registry of court. Petitioner appealed therefrom to the United States Court of Appeals for the Fifth Circuit which in a Per Curiam opinion affirmed the judgment of the district judge. A rehearing was applied for and refused, and petitioner has petitioned this Court to grant a writ of certiorari. The granting of such a writ is opposed by respondent.

V.

ARGUMENT

A.

The Louisiana Statutes and the Jurisprudence Both Recognize the Right of the Parties to a Life Insurance Contract to Stipulate that Premiums Shall Run from a Date Prior in Time to the Date of Issue of the Policy from which Date of Issue the Exclusion Period of Suicide as a Risk May Expressly Run.

It is axiomatic that in absence of express prohibitory statute parties are free to contract so long as the subject matter of the contract is not contrary to public policy.

It is because of the right of parties to freedom of contract that the legislatures of the various states have by statute outlawed certain provisions previously customary in insurance policies or have regulated the effective period of such provisions. In Louisiana, the question of exclusion of suicide as a risk in life insurance policies has met with legislative attention and the Louisiana legislature, while outlawing a suicide exclusion of prolonged duration, expressly recognizes the exclusion as a valid one if restricted to "two years from the *date of issue* of the policy." (See Louisiana Revised Statutes, Title 22, Section 170 B, quoted at pages 2, 3, 4 and 5, *supra*.)

Further, when we consider Louisiana Revised Statutes, Title 22, Section 171 (quoted at pages 2, 3 and 4, *supra*) providing that an insurance policy may be "dated back" as much as six months from the application therefor, in relation to the legislation restricting the suicide exclusion to "two years from the *date of* issue of the policy," *the conclusion is inescapable that the Louisiana legislature has foreseen the possibility that insurance contracts would be antedated so that the two-year "suicide" exclusion would run from a date of issue substantially later than the date from which premiums would run.* In view of the failure of the legislature to provide against such an obvious possibility, we can only assume that it was in that instance content to allow the parties to contract freely and without further restrictions or prohibition.

Although there is no Louisiana decision on the point, decisions in other jurisdictions are unanimous in upholding the validity of such an exclusion in cases where the exclusion period ran from the expressed date of issue rather than from an earlier date from which premiums were paid. The following decisions are directly in point:

Davis vs. Fidelity Mut. Life Ins. Co., (N.C., 4th U.S.C.A., 1939) 107 F. 2d. 150;

Forrest et al. vs. Mutual Benefit Life Ins. Co., et al., (N.Y. Sup. Ct., 1949) 86 N.Y.S. 2d. 910, (Affirmed by App. Div., 89 N.Y.S. 2d. 488);

Crowley vs. Travelers Ins. Co., (Tex., 5th U.S.C.A., 1952) 196 F. 2d. 315;

New York Life Insurance Company vs. Noonan, (Ore., 9th U.S.C.A., 1954) 215 F. 2d. 905.

In the *Davis* case application for insurance was made on January 23, 1936. Delay was experienced in issuing the policy and when it was tendered to the insured on March 23, 1936, he refused same on the ground that it was for $15,000.00 whereas he had applied for only $5,000.00. While refusing the policy, which was sent back to the company for reissuance in the amount of $5,000.00, the insured requested in writing that the anniversay date of the re-issued policy be fixed at February 27, 1936 in order that he might have the benefit of a lower premium, his insurance age changing on March 1, 1936; and he paid on March 23, 1936 a premium for six months expiring August 27, 1936. The corrected policy for $5,000.00 was delivered to the insured on March 28, 1936 and recited that it was executed "on the 27th day of March, 1936, which is the date of issue of this policy". The policy provided, however, that premiums would be payable "as if this policy had been issued February 27, 1936" and the policy stated that its anniversary date was February 27th. The insured committed suicide on March 16, 1938, more than two years from the date from which premiums had been paid but within two years of the *date of issue* of the policy. The United States Court of Appeals for the Fourth Circuit declared:

> "The contract of insurance provides that if the insured destroyed himself within two years from the 'date of issue' the insurance should only be a sum equal to the premiums paid. Having contracted that the 'date of issue' was March 27, 1936, the death of the insured by his own hand on March 16, 1938, brought into force this clause.

"*It is contended on behalf of the plaintiff that the fixing of February 27th as the anniversary date made that date the date of issue of the policy. We cannot agree with this contention.* The authorities relied upon by the plaintiff deal with a different state of facts from those found here.

* * * * *

"*Insurance companies have a right to make a lawful contract and have that contract enforced. The insured, when he accepts the policy, is charged with the knowledge of its provisions.*" (Emphasis supplied.)

The *Forrest* case involved an application, dated January 18, 1947, for a $20,000.00 policy, the application requesting that the first policy year "commence July 20, 1946, age 45." The policy thereafter issued bore a testimonium date of January 20, 1947 and upon the back of the policy there appeared the words "Date, 20th January, 1947." However, in the policy itself there was a provision reading: "Policy year. The 'Policy year' referred to herein is the year beginning on 20th July 1946 or on any anniversary thereof." The first premium paid was for the year ending July 20, 1947, and on or about July 20, 1947, a premium was paid for the year ending July 20, 1948. The policy contained a "Suicide" clause limiting recovery to the amount of premiums paid if the insured should commit suicide "within one year from the date of issue." The insured committed suicide on November 23, 1947—more than a year from July 20, 1946 but less than a year from the testimonium date of the policy. The Court, in denying a motion by plaintiff for summary judgment, said:

"The plaintiffs contend the 'date of issue' is July 20, 1946, whereas the defendant insists that January 20, 1947, is that date.

"No citation of authority is necessary to support the rule that in case of ambiguity in the terms of a written instrument, that construction will be adopted which is most favorable to the party who did not prepare the instrument—in this case, the insured.

"I do not believe the policy is ambiguous. The date of issue is January 20, 1947."

• • • • •

"In the present case, the policy stated a date which was the actual date of issue. That date under the above authorities must be regarded as the date which the parties agreed upon, unless proof to the contrary is produced. What is that proof? The first premium covers a period which had passed in part before the agreement was entered, but *there is no requirement that the date of issue, or the date upon the policy, must be the same as the date from which the coverage runs.*"

• • • • •

"*The insured herein received the benefit of a lower premium rate by starting the policy year six months earlier than the date of issue, but in the absence of clear language in the application or the policy showing that the policy in its entirety was to be dated back, there is no basis for the inference that the defendant agreed to shorten its suicide and incontestability provisions.*" (Emphasis supplied.)

Also directly in point is the *Crowley* case. The application for insurance was dated March 12, 1948 and the policy reckoned premiums from that date, which was stated to be the "Contract Date". The policy bore a date of issue of April 7, 1948 and the suicide clause excluded suicide as a risk for two years from the "date of issue". The suicide was committed on or about March 25, 1950, more than two years from the "Contract Date" but less than two years from the "date of issue". In affirming a judgment of dismissal, the United States Court of Appeals for the Fifth Circuit observed:

> *"The contract as a whole sets up two dates having different purposes and effects. The Contract Date, set up in capitals wherever used, fixes the date on which the premiums are to be paid, describes the period for which the term insurance policy is effective, and is also material in connection with the conversion privilege of the policy.*
>
> *"The date of issue, the date issued, the issue date, serves the purpose of marking the time on, or from which, certain clauses in the policy, the incontestable clause, the suicide clause, begin to run.*
>
> "The Contract Date, anterior to both the date of application and the date of issue, was placed in the contract at the request of the insured and for his benefit in the saving of premiums.
>
> "It thus appearing that the phrase, 'the date of issue', 'the date issued', serve one purpose, and the Contract Date quite another, all basis for the contention that there is a conflict or an ambiguity between application and contract falls, and the judgment is seen as a correct judgment in principle

and well supported by authority. Davis v. Fidelity Mutual Life Ins. Co., 4 Cir., 107 F. 2d. 150; Forrest v. Mutual Benefit Life Ins. Co., 275 App. Div. 939, 89 N.Y.S. 2d 488." (Emphasis supplied.)

In the *Noonan* case the application, dated June 15, 1951, had requested that the policy be written to take effect March 14, 1951. This request was made in order to conserve age. The policy as issued stipulated: "The anniversaries and insurance years of this Policy shall be determined from March 14, 1951, the date as of which this policy shall be deemed to take effect." The testimonium clause recited that the policy was executed by the company on June 22, 1951 "which is its date of issue". The suicide clause specifically excluded suicide "within one year from the date of issue of this policy". Suicide took place on May 23, 1952 more than one year from the date of March 14, 1951, the date from which premiums were determined, but less than one year from June 22, 1951, the expressed date of issue. In reversing a trial court's judgment for plaintiff, the Court said:

> "We are not able to agree that conflict or ambiguity exists. The entire contract is set out in the policy and the application, which latter was expressly made a part of the contract. *Clearly, the policy was in effect from March 14, 1951 for every purpose except the suicide and incontestability provisions. The latter are on their face governed by 'the date of issue,' which was specifically stated in the policy to be June 22, 1951. The two dates, March 14, 1951, and June 22, 1951, serve entirely different purposes, as is readily ascertainable from*

a reading of the instrument. The insured's suicide occurred within one year from the specified date of issue, hence applicant's obligation was limited to the return of premiums paid." (Emphasis supplied.)

In the petition for writ, petitioner urges that the decision of the trial judge and the decision of the Court of Appeals are in conflict with the following cases:

Mutual Life Insurance Co. of N. Y. vs. Hurni Packing Co., (Iowa, U.S. Sup. Ct., 1923) 263 U.S. 167, 68 L. Ed. 235, 31 A.L.R. 102;
New York Life Insurance Company vs. McCarthy, (Ala., 5th U.S.C.A., 1927) 22 F. 2d. 241;
Horwitz vs. New York Life Insurance Company, (Ore., 9th U.S.C.A., 1935) 80 F. 2d. 295;
State Mutual Life Insurance Co. vs. Stapp, (Ill., 7th U.S.C.A., 1934) 72 F. 2d. 142;
Schwartz vs. Northern Life Insurance Co., (Cal., 9th U.S.C.A., 1928) 25 F. 2d. 555.

The *Hurni* case, far from being opposed to the decisions of the trial and appellate courts in the instant case, is actually the leading case upon which the *Davis, Forrest, Crowley* and *Noonan* cases are based and upon which the district judge in the instant case heavily relied.

The *Hurni* case involved facts quite different from those of the instant case or those of the *Davis, Forrest, Crowley* and *Noonan* cases. It involved an "incontestable" clause which read as follows:

"Incontestability. This policy shall be incontestable, except for non-payment of premiums,

provided two years shall have elapsed from its date of issue."

The policy was applied for on September 2, 1915. At the request of the insured it had been antedated as of August 23, 1915, and the testimonium clause *(the only date mentioned in the policy) read:* "In Witness Whereof, the company has caused this policy to be executed this 23rd day of August, 1915." On trial of the case parole evidence was adduced to show that in fact the policy had been physically executed by the company only on September 7, 1915 and that it had not been delivered to the insured until on or about September 13, 1915. The company first availed itself of a defense of misrepresentation of the insured on August 24, 1917—more than two years from the testimonium date stated in the policy but less than two years from the date upon which (according to the parole evidence) the policy had been physically executed by the company. The Court held quite properly under those facts that the testimonium date had been adopted by the parties as the "Date of Issue" and that the "Incontestable" clause ran from that date.

The factual difference between the *Hurni* case and the instant case is obvious. Whereas in the instant case, as in the *Davis, Forrest, Crowley* and *Noonan* cases, the testimonium clause stated the *actual date of issue* but provided that premiums should run from a prior date, in the *Hurni* case the *entire contract* was, by agreement of the parties, antedated to August 23, 1915 and the testimonium clause bore that date. Nowhere

in the policy did the actual date of execution of the policy appear, and that date could be proven only by parole evidence.

But the importance of the *Hurni* case lies in the principle upon which it was based—the principle that the parties had a right to contract freely. The Court said:

> "It was competent for the parties to agree that the effective date of the policy should be one prior to its actual execution or issue; and this, in our opinion, is what they did. Plainly their agreement was effective to govern the amount of the premiums and the time of their future payment, reducing the former and shortening the latter, and, *in the absence of words evincing a contrary intent*, we are unable to avoid the conclusion that it was likewise effective in respect of other provisions of the policy, including the one here in question. This conclusion is fortifed by a consideration of the precise words employed, which are 'from its (that is, the policy's) date of issue:' or, in other words, from the date of issue as specified in the policy. *It was within the power of the Insurance Company if it meant otherwise, to say so in plain terms.* Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it." (Emphasis supplied.)

Unlike the defendant in the *Hurni* case, the respondent in the instant case *did* in plain terms stipulate in its policies in accordance with the Louisiana statute

(Louisiana Revised Statutes, Title 22, Section 170, Subsection B, quoted at pages 2, 3 and 4, *supra*) that the suicide exclusion should run from the Date of Issue and did in its policies plainly set forth the respective dates of issue of said policies.

The *McCarthy* case involved a suit for cancellation on ground of misrepresentation in the application. The date from which the "incontestable" clause ran was not at issue, because the action was timely brought whichever date was held to govern. The policy was issued on February 24, 1925, although it "took effect" on February 3, 1925. A bill in equity for cancellation was filed on February 1, 1927, in ample time regardless of the controlling date.

The *Horwitz* case, though no more in point than the *McCarthy* case, is not so easily or so quickly disposed of. The facts of that case are somewhat complicated and two different policies were involved. First, a policy (referred to in the court's opinion as the "amended policy") which had been amended subsequent to issuance in order to add benefits for permanent total disability. Second, a different policy (referred to in the court's opinion as the "combined policy") wherein disability and life benefits had been both originally provided for in the policy. Both policies were the subject of a bill in equity filed by the insurance company on January 6, 1933 for cancellation on ground of fraudulent misrepresentation made by the insured and contained in the applications for the policies. Despite some similarity in facts, neither issue involved the identical situation found in the instant case.

The issue with regard to the "amended policy" was simple and had no possible pertinency to the instant case. The Court held that the amendment adding the disability benefits had expressly adopted as its own "date of issue" the "date of issue" of the original policy, which "date of issue" as shown in the testimonium clause of the policy was *May 27, 1930*. Accordingly, a bill filed on *January 6, 1933* was obviously filed too late in view of an "Incontestable" clause contained both in the policy and in the amendment running for two years from "date of issue".

The issue next considered by the Court in the *Horwitz* case was the contestability for fraud of the life insurance of the "combined policy". The facts as to the "combined policy" were as follows:

On some *undisclosed* date Charles Horwitz applied to the company for a policy of insurance. The application contained the following direction: "Date policy as of Sep. 29, 1930"—and the following agreement:

> "*It is mutually agreed* . . . said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not" (Emphasis supplied.)

Pursuant to said application a policy containing the following provisions was issued:

> "The Contract.—The Policy and the application therefor, a copy of which is attached hereto, constitute the entire contract. * * *

"This contract is made in consideration of the application therefor and of the payment in advance of the sum of $518.48, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Twenty-ninth day of September Nineteen Hundred and Thirty-one, and of a like sum on said date and every Twelve calendar months thereafter during the life of the Insured. * * *

"This Policy takes effect as of the Twenty-ninth day of September Nineteen Hundred and Thirty, which day is the anniversary of the Policy. * * *

"In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this Seventh day of January Nineteen Hundred and Thirty-one. * * *

"Incontestability. —This policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

On these facts, the Court disposed of the January 7, 1931 testimonium date as follows:

"In view of the fact that it was 'mutually agreed' between the parties that the insurance should be 'subject to the provisions of the policy applied for' and that the application was to 'Date policy as of Sep. 29, 1930,' the date of January 7, 1931, in its testimonium clause must be deemed 'as of,' that is, as if it were, September 29, 1930. The mutual agreement for a policy so dated would have no effect whatsoever unless given this interpretation, and we accept it as necessary, regardless of the

rule of construction favoring the insured. The contract must be construed as if the testimonium date was September 29, 1930."

Having so simply converted the testimonium date from the stated date of January 7, 1931 to "as of September 29, 1930", the Court had no difficulty, in view of the precedent of the *Hurni* case, in declaring that the incontestable period ran from that date rather than from the date of actual delivery of the policy to the insured:

> "The question then is, Which of the two dates is the date of the policy's 'issue'? That in the testimonium clause, which is also the anniversary date and is more than two years prior to the filing of the bill; or, the date of actual delivery, within the two year period of contestability?
>
> "That the testimonium date is the date of issue was decided by the Supreme Court in Mutual Life Ins. Co. v. Hurni Packing Co., 263 U.S. 167, 174, 175, 176, 44 S. Ct. 90, 68 L. Ed. 235, 31 A.L.R. 102."

It is to be observed that although the court in the *Horwitz* case purported to follow the decision of your Honors in the *Hurni* case, it actually did violence to the principle enunciated in that case hereinabove quoted at page 21, *supra*. This it did by discounting the expressed testimonium date and interpreting that date as being "as of September 29, 1930." But the critical factor relied upon by the court in the *Horwitz* case is not present in this case—i.e., the "mutual agreement" contained in the application. There was no such "mu-

tual agreement" in the application for either of the policies in suit.

The *Stapp* case is not at all germane to the issues presented in this case. The "Suicide" clause extended for two years "from the date hereof"; *the two policies involved were both dated January 12, 1931;* and premium payments were due on January 12th. The insured committed suicide on January 27, 1933. Parole evidence showed that as to one policy the initial premium was paid and the policy was delivered on February 10, 1931 and that as to the other policy the initial premium was paid and the policies were delivered on January 28, 1931. As against a defense that the policies did not go into effect until the initial premiums had been paid and that therefore the two years of the "Suicide" clause ran respectively from February 10, 1931 and January 28, 1931, rather than from the date of the policies (January 12, 1931), the Court on facts substantially identical to those in the *Hurni* case properly invoked the authority of the *Hurni* case to allow recovery on both policies.

Nor is the *Schwartz* case at all apropos of the instant case. The "Suicide" clause excluded suicide within one year *"from date policy becomes effective"*. Although the policy was dated August 14, 1924, it fixed the annual premium due date as August 2. The application had been signed on August 2, 1924 and the insurance agent had accepted a note of the insured in payment of the first annual premium. The premium receipt provided that the insurance should "take effect when an examination of the applicant satisfactory to the company has

been made by its medical examiner." The medical examination also took place on August 2, 1924. The suicide took place on August 9, 1925. *In view of the wording of the "Suicide" clause reckoning the year "from date policy becomes effective", the Court properly held that a suit to cancel the policy on the ground of suicide could not prevail.*

B.

The Correctness of the Decisions of the District and Appellate Courts in the Instant Case is Unaffected by the Fact that Under Louisiana Jurisprudence a Life Insurance Contract is "Indivisible".

At page 6 of the petition for writ, it is declared:

> "We say that a single premium having been paid on the entire risk for all benefits, for all coverage, and for everything provided in the policy, the contract was indivisible, and each policy was in force in its entirety from April 16, 1955. (See Figgins v. Life & Casualty Ins. Co., 151 So. 128, and Smith v. Washington National Ins. Co., 56 So. (2d) 769.)"

The *Figgins* and *Smith* cases cited by petitioner in the above quotation from the petition for writ, are in no way analogous to the instant case on their facts. They simply exemplify the principle that where a single premium is paid on a multi-coverage policy the premium cannot be split among the coverages in the event of lapse or cancellation of one coverage unless the policy itself apportions the premium to the various coverages provided by the policy.

No such issue is presented here.

Respondent concedes the indivisibility of the respective policies at issue, but fails to understand how the legal fact of indivisibility affects the instant case. *Of course,* the entire policy was in force in each instance from the respective dates of application. But they were in force *in accordance with their terms* which expressly excluded suicide as a risk for two years from their respective *dates of issue.*

The "Indivisibility" argument would apply, if it applies at all, to *any* temporary exclusion from coverage regardless of the date from which the period of exclusion would run. Yet that it does not validly apply to a suicide exclusion is evident from Louisiana Statutes, Title 22, Section 170 (B) which expressly sanctions a two year suicide exclusion from the *date of issue* of the policy.

C.

There are no Conflicts Between the Provisions of the Policies on the One Hand and the Provisions of the Applications and Premium Receipts on the Other Hand.

At page 5 of the petition for writ it is declared:

> "Defendants' claim that the operation of the suicide clause was delayed until the actual dates upon which the policies were signed (May 9 and July 6, respectively) is inconsistent, we submit, with the receipt given for the initial premium on

one policy (R. 31), and with the application for the second one (R. 53).

"The receipt given for the payment of the initial premium on the first policy at the time the application was signed read in part as follows:

"'Insurance, *subject to the terms and conditions of the policy contract*, shall take effect as of the date of this receipt * * *' (R. 31.)

"We contend that there can be but one reasonable interpretation of this language, that is, that the insurance, and all of it, and the policy in its entirety, would take effect on that day, and not on May 9, 1955, as the insurer successfully contended.

"The application for the second policy asked the insurer to

"'Please date contract 16 April 1955 * * *' (R. 46.)

"We submit that this application, which was accepted and which was acted upon, and which forms a part of the policy, required that the entire contract be dated, and be effective from April 16, 1955, and not from July 6, 1955." (Emphasis supplied.)

In reply, we simply point out to your Honors the qualifying language of the premium receipts, namely: ". . . *subject to the terms and conditions of the policy contract* . . . ."

This clause clearly told the insured that the receipts did not contain all of the terms and conditions of the insurance contracts and that those terms and conditions would be incorporated into the policies to be issued.

It is common knowledge that insurance policies contain provisions excluding suicide as a risk for certain periods of time. The insured could not as a reasonably intelligent man have failed to realize that the policy provisions with regard to suicide would govern the insurance contracts.

On the basis of the receipts he was entitled to believe that *such coverage as was afforded by the policies* would become effective as of the dates of the completion of his respective applications and payment of the initial premiums, provided he was accepted by the company as a risk. He was *not* justified, *on the basis of the receipts,* in assuming that he would be covered as to suicide from the respective effective dates of the contracts or from two years from those dates. He was obligated to read the policies or to otherwise inquire as to the details of coverage as to suicide. Had he read his policies or had he made inquiries, he would have learned that suicide was a risk covered by the policies only after two years from the respective Dates of Issue of such policies.

It is well to point out, too, that the premium receipts are not parts of the insurance contracts and therefore are themselves immaterial to the issues of this case. The insurance contract is in each instance expressly restricted to the policy itself and the application attached thereto. (See provision of policy quoted *supra*, at p. 9). The receipts served only one purpose, namely, they were and are evidence that the initial premiums were paid. That point is not an issue in this case.

As to the request in the application for Policy No. MP 14,785,307, that request actually reads as follows:

> "Please date contract 16 April 1955, conserving age 42. Issue on medical 16 April 1955 in issuing contract # 14,742,108."

It is clear, therefore, that this request had nothing at all to do with the date from which the two year period of exclusion of the risk of suicide should run. The request shows on its face that the insured was interested in conserving age 42 in computation of premiums and in avoiding the nuisance of a second medical examination. To accomplish these objectives, he was obliged to suffer the penalty of paying premiums from April 16, 1955, rather than from June 9, 1955, the date he applied for Policy No. 14,785,307 or from some subsequent date he may have designated. In return, he received a slightly lower premium and he received an earlier register date from which dividends, loan values, and cash values were computed.

The request had nothing to do with the "Suicide" clause of the policy or with any of the terms or conditions of the policy other than its effective date for computation of premiums, dividends and loan and cash values. On the very date he signed the request, the insured paid an initial three months premium and received a receipt which, in effect, referred him to the policy for its terms and conditions.

Accordingly, here again any confusion in the mind of the insured was produced by his own failure to read the policy when issued to him. If he was dissatisfied that the "suicide" clause had not been "dated back" to

April 16, 1955, he was no more obligated to accept the policy than the respondent was obligated to "date back" the running of the suicide clause.

VI.

CONCLUSION

In conclusion, we submit the petition for writ is wholly without merit. No substantial question of law is raised. All decisions in point on their facts are in accord with the decisions of the District and Circuit Courts and those decisions are in perfect harmony with the decision of this Court in *Mutual Life Insurance Co. of N.Y. v. Hurni.*

Respondent accordingly urges that the petition for writ be denied.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that a copy of this brief in opposition to petition for writ of certiorari has been duly served upon counsel for petitioner, Grove Stafford, Esq., by depositing this day in the United States mail a copy of same enclosed in an envelope addressed to him at 628 Murray Street, Alexandria, Louisiana, with first class postage prepaid.

New Orleans, Louisiana, this .... day of May, 1960.

.....

AL. C. KAMMER